STATE OF MICHIGAN

COURT OF APPEALS

MARIE MALBURG, as Guardian of EDWIN MALBURG, a Legally Incapacitated Person,

Plaintiff-Appellant,

v

RICH DAGENAIS and FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
April 24, 2007

No. 275229
Oakland Circuit Court
LC No. 06-074342-NM

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff Marie Malburg, as Guardian of Edwin Malburg, a Legally Incapacitated Person, appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On May 21, 2001, Edwin Malburg contacted defendant Farm Bureau General Insurance Company of Michigan to purchase insurance for two trailers he used in his business. The trailers were mobile only when attached to an independent power source. Defendant Rich Dagenais sold Edwin Malburg a no-fault policy that provided personal insurance protection and underinsured motorist benefits. The policy provided that no coverage would be afforded to any person occupying an auto owned by the insured or a family member but not insured under the policy.

On October 15, 2001, Edwin Malburg was seriously injured when the truck he was driving was struck by another vehicle. Neither trailer insured by defendants was involved in the accident. Edwin Malburg filed suit against Allstate Insurance Company, the insurer of the truck he was driving when the accident occurred. On July 18, 2003, Edwin Malburg filed an amended complaint adding Farm Bureau as a defendant and alleging breach of contract based on Farm

Bureau's denial of his claim for underinsured motorist benefits.[1] Allstate was dismissed as a defendant, having settled the claim against it.

Farm Bureau moved for summary disposition, alleging, inter alia, that its policy did not afford underinsured benefits to Edwin Malburg because the vehicle he was driving when the accident occurred was not insured by Farm Bureau. The trial court denied the motion.

This Court granted Farm Bureau's application for leave to appeal, and in *Malburg v Farm Bureau Gen Ins Co of Michigan*, unpublished per curiam opinion of the Court of Appeals, issued April 13, 2006 (Docket No. 258886), reversed the decision of the trial court holding that the owned vehicle exclusion was enforceable and barred coverage. *Id*., slip op at 2-3.

On May 5, 2006, plaintiff filed this suit, naming Dagenais and Farm Bureau as defendants. In the complaint, plaintiff alleged that Dagenais, a licensed insurance agent selling policies on behalf of Farm Bureau, acted negligently by selling Edwin Malburg a policy that likely would never provide benefits given the nature of the trailers (i.e., that they could not be driven) and the inclusion in the policy of the owned vehicle exclusion.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claim was barred by the three-year statute of limitations for negligence claims, MCL 600.5805,[2] and the doctrine of res judicata, because plaintiff's claim could have been litigated in the first action.

In response, plaintiff argued that her claim was not barred by the statute of limitations because it was brought within six months after she discovered the claim upon reading this Court's opinion in the previous action. MCL 600.5838(2). Plaintiff also argued that the doctrine of res judicata did not bar the instant action because the instant action was based on a theory of professional negligence as opposed to breach of contract.

The trial court granted defendants' motion for summary disposition, finding that the claim was barred by the doctrine of res judicata and the statute of limitations.

We review a trial court's decision on a motion for summary disposition de novo. When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), we must accept as true the plaintiff's well-pled allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

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[1] On October 1, 2003, the caption was amended to reflect that Marie Malburg had been appointed as Edwin Malburg's guardian.

[2] Defendants noted that plaintiff's claim was based on negligence, and identified May 21, 2001, as the date the cause of action accrued. Therefore, defendants reasoned, the statute of limitations under MCL 600.5805(10) expired on May 21, 2004. However, defendants asserted that the two-year statute of limitations under MCL 600.5805(6), applicable in professional liability cases, applied to the case against Dagenais, a licensed insurance agent.

Plaintiff first argues that the trial court erred by granting defendants' motion for summary disposition based on a finding that the claim was barred by the statute of limitations. We disagree.

Generally, an action charging malpractice must be brought within two years of when the claim accrued. MCL 600.5805(6). A malpractice claim against a nonmedical state-licensed professional accrues at the time the defendant discontinues serving the claimant in a professional capacity regarding the matters out of which the claim arose, regardless of when the claimant discovered the claim. MCL 600.5838(1). The two-year limitations period is subject to a six-month discovery rule exception. A nonmedical malpractice claim may be commenced after the expiration of the two-year period if it is commenced "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838(2). Whether a plaintiff should have discovered a claim is tested objectively by application of a reasonable person standard. *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993). A plaintiff has discovered a claim if he has discovered a possible cause of action. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). The discovery rule requires that the plaintiff knew of the act giving rise to the malpractice, and that the plaintiff had reason to believe that the act or omission was improper. A claim accrues once the plaintiff is aware of the injury and of its possible cause. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997).

Dagenais sold the policy to Edwin Malburg on May 21, 2001. Edwin Malburg's disabling accident occurred on October 15, 2001. The date on which Farm Bureau denied coverage is not clear; however, on July 18, 2003, Edwin Malburg added Farm Bureau as a defendant in the previous suit, and alleged that Farm Bureau breached its contract by declining to pay underinsured motorist benefits. At that time, Edwin Malburg knew that Farm Bureau took the position that the policy he held did not entitle him to benefits. Edwin Malburg also knew that Dagenais had sold the policy to him. A reasonable person should have discovered a possible cause of action against Dagenais as well as against Farm Bureau at that time. *Solowy*, *supra*; *Gebhardt*, *supra*; *Levinson*, *supra*. The six-month discovery rule for the claim of malpractice against Dagenais began to run, at the latest, when Edwin Malburg added Farm Bureau to the original action. The instant action was not filed until May 5, 2006. The trial court did not err in concluding that the instant action was barred by the statute of limitations. MCL 600.5838(1), (2).

Plaintiff also argues that the trial court erred by granting defendants' motion for summary disposition on the ground that the instant action was barred by the doctrine of res judicata. We disagree.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first case; and (4) both actions involved the same parties or their privies. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994). The applicability of the doctrine of res judicata is reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

The requirements for the application of the doctrine of res judicata were met in this case. The previous case was decided on the merits, and the decision rendered therein by this Court was a final decision. Dagenais was not named as a party in the previous case; however, Farm Bureau and Dagenais were in privity. Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). A principal and an agent are in privity. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003). Both the previous case and this case involved the same parties or their privies. Finally, the issue contested in this case, i.e., whether Dagenais was professionally negligent, could have been litigated in the previous case. Both cases turned on whether coverage was available under the policy sold by Dagenais to Edwin Malburg. The same evidence would sustain both actions; thus, the actions are the same for the purposes of res judicata. *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998), aff'd 464 Mich 711; 629 NW2d 915 (2001). The trial court did not err in granting summary disposition on the basis of res judicata.

Finally, we note that plaintiff's assertion that the claim for coverage and the claim against Dagenais could not have been asserted in the same action because they are inconsistent is erroneous. MCR 2.111(A)(2) provides that inconsistent claims may be asserted in a single action.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood